United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1352

IN THE

UNITED STATES COURT OF APPEALS

For The Second Circuit

UNITED STATES OF AMERICA Plaintiff-Appellee vs. DONALD RICHARD BRANT Defendant-Appellant	:	CRIMINAL NO. 75-16

Appeal From The United States District Court
For The District Of Vermont

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUES

I. DID THE TRIAL COURT ERR IN ADMITTING EVIDENCE OF THE DEFENDANT'S PRIOR CRIMINAL ACTS?

II. DID THE TRIAL COURT ERR IN FAILING TO POLL THE JURY AFTER LEARNING OF PREJUDICIAL PUBLICITY DURING THE TRIAL?

III. DOES THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR NEW TRIAL CONSTITUTE ERROR?

STATEMENT OF THE CASE

A. Proceedings Below

Defendant-Appellant, Donald Richard Brant, was charged in a two count indictment with violations of Sections 2113(a) and 2113(d) of Title 18, United States Code. Count I alleged a conspiracy to rob a federally insured bank, and the second count charged defendant with the robbery itself. A jury trial was held in the United States District Court for the District of Vermont with the Honorable Albert W. Coffrin, United States District Judge presiding on days between the 20th of May and the 28th of May, 1975. The defendant was convicted, and he appeals from the judgment of guilty and the sentence of twenty years imprisonment.

B. Facts

On the first day of trial, counsel for the defense learned that the Government would introduce evidence of a prior bank robbery involving defendant, which bank robbery took place some six months prior to the bank robbery for which defendant was on trial. On the morning of the second day of trial, counsel for the defense argued that such proposed evidence should be excluded; moved for a continuance to prepare to meet the new evidence; and moved for a mistrial. The motions were denied and the evidence was admitted without prior

cautionary instructions from the court.

There was considerable evidence and no dispute as to the fact that on April 11, 1974 a robbery took place at the South Burlington branch of the Chittenden Trust Company shortly before it was to open in the morning. The robbery was performed by three persons who were armed and disguised with Halloween masks and baseball caps. The robbers drove up behind a courier who was delivering coin and currency to the South Burlington branch of the Chittenden Trust Company. (A. 9, 10) The bank robbers announced their intentions to the bank courier and assistant branch manager; frisked the courier and began loading the money which had been in the courier's car into their own vehicle. (A. 11, 12) After expressing their disappointment at the fact that most of the haul was in change, the robbers told the courier and the assistant branch manager to lie down in front of the bank's door and remain in that position until they had left. (A. 13) There was also evidence that the robbers had stolen an automobile which they used in the robbery from the General Electric parking lot, and had abandoned this vehicle immediately after their escape. (A. 25, 26, 47)

With the exception of the testimony of James E. Gardner, a self-confessed participant in the robbery, there was absolutely no evidence whatsoever linking the defendant with the crime. No other witness identified defendant to place him at the scene. Although the recovered automobile contained a hat, mask, and tools purported to have been used to secure the automobile, as well as some of the stolen goods and the money bags taken in the robbery, there was no physical evidence that the defendant was present or participated in the robbery. (A. 27, 28) Not only were the defendant's

fingerprints not found in the automobile, but no hair or other evidence was found to show any participation of Mr. Brant. Without the testimony of Gardner, there was no evidence in the record to connect the defendant with the crime.

In order to bolster the credibility of its principal witness and to show the guilt of the defendant, the Government introduced evidence of a prior bank robbery which took place in the State of New Hampshire during October of 1973. (A. 17) Despite objections and appropriate motions filed by counsel for the defense, such evidence was admitted, and a considerable portion of the Government's case was related strictly to the events in the New Hampshire robbery rather than the events in Vermont. (For appropriate objections and motions by defense counsel, see A. 20, 21, 23, 24, 29, 50, 58)

On the morning of May 27 counsel for the defense asked the presiding judge if he was aware that during the weekend recess there had been publicity relating to an attempted escape by the defendant. (The jury was not sequestered during the trial.) The Judge replied that he had read a newspaper account of the attempted escape, but after argument and discussion of the matter the Court declined to poll the jury. On the 28th day of May, 1975, the jury returned a verdict of guilty on both counts as charged in the indictment.

That morning, May 28, further publicity appeared in the Burlington Free Press, before the jurors returned to court, reiterating the news of the defendant's escape attempt and declaring that the defendant had been indicted for a double murder in the State of Connecticut.

Throughout the course of the proceedings whenever the jury was excused because of recess, the trial judge would admonish the jurors not to

discuss the case among themselves, or members of their family, or to listen to anything about it or read anything about it. (A. 14, 15, 36, 39, 48, 51, 52, 59) Nevertheless, when it came to the attention of the court that during the course of the three day recess there had been publicity regarding an escape attempt by the accused, the court refused to poll the jury to determine the extent of the prejudicial effect of such publicity. (A. 53-57)

Similarly, the court denied defendant's Motion for a New Trial dispite the fact that the only daily newspaper in the area had carried an article early in the morning on the day of the jury's verdict stating that the defendant had been charged with a double murder, and repeated the story of the defendant's escape attempt. (A. 6-8)

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING HIGHLY PREJUDICIAL EVIDENCE OF DEFENDANT-APPELLANT'S PRIOR CRIMINAL ACTS.

As noted by Professor Weinstein in his discussion of the problem here under consideration, "Central to the Anglo-American system of criminal law is the concept that the accused must be protected against forceable inculpation - either through his words or proof of his past misdeeds". 2 Weinstein, Evidence, United States Rules, at 404-23. The same authority notes that, "the introduction of such evidence is said to create a danger that the jury will punish the defendant for offenses other than those charged, or at least that it will convict when unsure of guilt, because it is convinced that the defendant is a bad man deserving of punishment". Weinstein, supra, at 404-24. These principals are not in conflict with the rule of this Circuit stated in the case of United States v. Deaton, 381 F.2d

114, (2d Cir. 1967), at 117, "that evidence of similar acts, including other crimes, is admissible when it is substantially relevant for a purpose other than merely to show defendant's criminal character or disposition". It is submitted that the goal of the Second Circuit inclusionary rule is identical to the exclusionary rule currently embodied in Rule 404 of the Federal Rules of Evidence. As stated by Judge Anderson in United States v Deaton, supra at 117: "Whichever method is adopted, the trial judge is required, as with any potentially prejudicial evidence, to balance all of the relevant factors to determine whether the probative value of the evidence of other crimes is outweighed by its prejudicial character". It is in this balancing process that the purpose of the prosecution in seeking to introduce evidence of other criminal acts becomes the fulcrum of the court's decision making.

In seeking to convict Donald Brant, the Government was forced to rely upon the testimony of James Gardner. Mr. Gardner admitted to being a participant in the robbery and was characterized by the United States Attorney in his closing argument to the jury as "a wholly worthless individual. . . . He is utterly worthless," (A. 60) As declared in the Government's memorandum of law in support of admissibility of prior criminal acts, Gardner's detailed account of Brant's participation in the New Hampshire bank robbery was being offered for the specific purpose of countering Brant's defense that Gardner is lying". (See Government's Memo at page 2) It was the hope of the Government that the jury would "infer that he [Gardner] is telling the truth not only with respect to the New Hampshire bank robbery, to which the cooberation primarily relates, but also with respect to the Vermont bank robbery". (See Government's Memo at page 2) The prosecution's memorandum concluded that:

"The prior similar act of bank robbery in New Hampshire should be admitted in order to prevent a miscarriage of justice should the defendant Brant seek to discredit the witness Gardner with respect to the Vermont transaction." (See Government's Memo at page 4) This contention by the prosecution initially left the trial court "a little mystified". (A. 16) In oral arguments to the court, the United States Attorney was even more frank about the purpose for which the evidence was offered. He concluded his argument as follows:

> ". . . I am sure there are a few other matters that were performed quite similarly, and we think the inference the Jury would draw through the witnesses from New Hampshire, who definitely pin Gardner and Brant together just before the robbery, that the similarity of the acts over there is probative of the fact that the same people committed the acts in Vermont. We offer that as affirmative proof, as well as of Gardner's credibility." [Emphasis added] (A. 17)

It is respectfully submitted that at this point no further rebuttal by counsel for the defense should have been required. Counsel for the Government had admitted his intention to use evidence of one crime, the New Hampshire robbery, to convict Mr. Brant of the crime for which he was being tried, the Vermont robbery. However, argument continued with counsel for the defense observing that the testimony regarding the New Hampshire bank robbery was highly prejudicial and placed counsel in the intolerable position of having to defend Brant on a completely different set of factsrelating to a crime of which he knew nothing. (A. 18-23) Counsel for the defense sought a two week continuance to prepare to meet the surprise evidence, moved for a mistrial, and repeated his objection and motions throughout the proceedings. (A. 23, 24, 29, 58) Nevertheless, in reliance upon the decision of United States v Johnson, 382 F.2d 280 (2d Cir. 1967), the trial court ruled that it would admit the evidence of the New Hampshire robbery. Counsel for the defense had not pre-

viously read this case, but reviewed it during argument before the court and sought to distinguish it, noting that in Johnson the evidence of a prior similar crime was admitted to prove specific element of intent. (A. 20) Indeed, Johnson is properly distinguishable upon that basis. Johnson is a per curiam decision involving the robbery of a particular firm in the garment district of New York on two occasions four months apart, and an attempted theft on the same day as a second successful robbery. In each instance, the robber simulated a weapon in his pocket. Defendant Johnson was indicted for the first robbery and the second robbery, but not the third attempt. At trial evidence of the aborted attempt was admitted because it was "of great probative value in showing intent in a pattern or scheme of systematically planned and practically identical criminal acts and in corroborating the identification of the appellant, which had been made by each of the victims of the separate counts". Id at 281. In contrast to the facts before the court in Johnson there was no "great probative value" to the evidence introduced against Mr. Brant.

Not only did the trial court refuse to exclude the evidence of Brant's participation in the New Hampshire bank robbery after argument of counsel, but when such evidence was introduced the bench refrained from giving any cautionary instruction to the jury. (A. 35) Mr. Gardner then testified that the New Hampshire robbery was similar to the Vermont robbery in the following respects: a car was stolen, weapons (including a sawed-off shotgun) were used, the robbery took a similar amount of time, three persons were involved and the participants in the robbery wore masks and hats. The robberies differed in that the New Hampshire bank robbery took place inside in a materially

different setting than the robbery in South Burlington. It is submitted that on their face such similarities are no more than common traits of robberies in general, and do not approach any unique, idiosyncratic, unusual or distinctive pattern. However, the trial court was presented with expert evidence through a witness initially called by the Government. The evidence clearly established that what the Government sought to introduce as elements of a particular common scheme or plan are no more than common features to bank robberies in general.

The Government's witness was Special Agent Charles Riley of the Federal Bureau of Investigation. He testified as to items recovered from the automobile allegedly stolen by the participants in the New Hampshire bank robbery. Mr. Riley had occasion to investigate the New Hampshire bank robbery because he was a member of the bank robbery squad which covered the States of Maine, New Hampshire and western Massachusetts. On cross-examination by counsel for the defense, Mr. Riley testified that during his five years of experience as an FBI agent, each element in the New Hampshire bank robbery was common to bank robberies in general. The following questions by defense counsel and answers by Mr. Riley are taken from pages 529-535 of the transcript.

Q. How do bank robberies break down? Are there usually two or three people involved, or one particular pattern to it?

A. Each bank robbery can have a different number of people involved, or can be a difference in cars.

Q. What I am asking is, is it often that there is just one bank robber or usually a couple or more, in your experience?

A. I would have to state that in the Boston division normally

more than one person is involved.

Q. Are there seldom four or five in your experience. I am just asking from your experience.

A. From my experience, I would have to say, yes.

Q. So you would say from your experience the most part it ranges from about two or four, somewhere in there?

A. I would have to state, yes.

Q. How about stolen cars, are they common with bank robbers?

A. Yes.

Q. Do you find in your investigations that they are generally used more often or not, stolen cars?

A. Yes.

Q. In fact, it is quite rare to find a bank robber that doesn't use a stolen car, is it not?

A. Yes.

Q. Any makes of stolen cars that are more preferrable than others, in your experience?

A. Ford Motor products.

Q. Why is that?

A. Ignitions have a tendency to come out very easily.

Q. Do you know what a dent puller is?

A. Yes.

Q. Common weapon?

A. Yes.

Q. Then a Ford car seems to be preferrable in this kind of

work because of the ease in which the ignitions can be removed?

A. Ignitions removed and also the starting of the car afterwards.

Q. How do you start it afterwards?

A. With a screwdriver, or any blunt instrument can be inserted into where the ignition has been pulled out.

Q. Is this a sort of pattern you see all over New England in your investigations?

A. Right.

Q. Do they usually wear street shirts, or put on some sort of coat, jacket, hat, that sort of thing as a general rule, in your experience?

A. They wear a hat sometimes. Normally, it is some type of outer garmet.

Q. Do they wear masks or do most bank robbers walk in with a bare face?

A. Masks.

Q. What form do these masks usually take?

A. Ski masks.

Q. Do Halloween masks sometimes get used?

A. Yes.

Q. Is that sometimes - common?

A. Yes.

Q. Do bank robbers use guns?

A. Yes.

Q. Do they sometimes saw off the end of them?

A. Yes.

Q. Has this been relatively common in your experience?

A. Yes.

Q. After you finish your investigations, do you often find a stolen car somewhere nearby?

A. Yes.

Q. What is the reason for that?

A. Since it is a stolen car, they will switch into another car.

Q. This is a common pattern?

A. Yes.

Q. So there really wasn't too much about this bank robbery from what you saw about it that was any different from any other bank robbery you've seen before?

A. As far as the search of the automobile and the items inside, I'd state, no.

Thereafter, defense counsel again moved the court that all evidence of the New Hampshire robbery be stricken from the record and not for consideration by the jury because the evidence had proven to be "prejudicial and has no probative value". (A. 58) The motion was denied. (A. 58)

It is respectfully submitted that certainly after having heard the evidence and having had more than adequate opportunity to balance its prejudicial effects with its probative value, the court abused its discretion in

denying defendant's motion. As noted above, and as stated by this court in United States v. Johnson, 382 F.2d 280 (2d Cir. 1967) at 281, it is the duty of the trial judge to: "exclude such evidence if in the exercise of his discretion he finds that its probative value is outweighed by its prejudicial character". While counsel has been unable to find a similar fact pattern in a Second Circuit decision, there are cases on point from other jurisdictions which establish the abuse of discretion in this case. Foremost among these is the case of People v. Crawford, 78 Cal. Rptr. 628 (Cal. App. 2d 1969). In the Crawford case, defendants Crawford and Daniels were convicted of murder and robbery. The crimes involved the robbery of a liquor store on February 14, 1967. To establish the identity of the perpetrator of the February robbery-murder, the Government introduced evidence of a grocery store robbery which took place in March of the same year on the theory of a similar modus operandi. The common elements of both robberies were the following: "(1) defendant Daniels was the gunman in each robbery; (2) defendant Crawford was Daniels' accomplice in each robbery; (3) defendant Daniels discharged his weapon in each robbery; (4) defendant Daniels directed the victims and took the money in each robbery, and defendant Crawford acted as a 'lookout'; and (5) the bullet slugs recovered from each robbery were a .45 caliber." People v. Crawford, supra at 631. In considering these elements, the court quoted from its prior decisions in People v. Haston, 69 Cal.2d 233, 70 Cal.Rptr. 419, 444 P.2d 91, that "'it is common knowledge that each and all of the indicated marks are shared not only by the charged and uncharged crimes herein involved, but also very many armed robberies'." People v. Crawford, supra at 631. The court concluded that, "under these circumstances, we con-

clude that the court should have exercised discretion in favor of exclusion, and that the admission of evidence relative to the subsequent robbery constituted an abuse of discretion." Id at 632. Similarly, in the decision of People v. Snyder, 80 Cal.Rptr. 822 (Cal. App.2d 1969) at 825, the Appellate Court ruled that "The fact that two men were involved in each robbery, that only one carried a gun, that the crimes occurred late at night, that the establishments robbed were small businesses and the proprietors were alone at the time, do not qualify as distinctive factors. Very many robberies share these marks. The trial court therefore erred in admitting evidence of the subsequent offense." The Supreme Court of Montana applied similar reasoning in a different context in the case of State v. Sauter, 232 P.2d 731 (Mont. 1951). In this prosecution for rape, the trial court had allowed evidence which included statements of the defendant tending to show that he had committed rape upon another woman some time prior to the offense with which he was charged at trial. The court noted that: "Sexual acts, whether rape or no rape, originating in bar room pickups, coward by the urge, and consummated in automobiles are entirely too common in this day and age to have much evidentiary value in showing a systematic scheme or plan." Id. at 732. See also Moore v. State, 299 S.W.2d 838 (Ark. 1957), (error to permit state to prove that two or four defendants on trial for murder had assaulted and robbed another hitchhiker five days after attack upon decedent); State v. Edwards, 493 P.2d 180 (Ore. 1972), (in prosecution of armed robbery of a hitchhiker, error to admit testimony by alleged accomplice and victim of prior robbery). These authorities provide ample precedent for

the compelling conclusion that the testimony presented by the Government concerning the New Hampshire robbery is without proper evidentiary value.

It should be noted furthermore that Mr. Brant had not even been charged with the New Hampshire robbery about which Gardner testified. As stated in 2 Weinstein, Evidence, United States Rules, 404-406: "another obvious problem is that of proving the other crime. To the extent that there is a serious question about whether the accused committed another crime, the entire line of proof is seriously attenuated". [Emphasis added]

Finally, the fact that Gardner told the jury that he was present to tell the truth should not cause this court on review to overlook the fact that he clearly did not tell the truth in part of his testimony on the stand. As noted hereinabove, Gardner was characterized by the United States Attorney as "worthless" and is a 36 year old convicted murderer and bank robber whose criminal record dates back to before the first day of majority. (A. 30, 31) In return for his testimony against Brant and another individual, the Federal Government agreed not to prosecute him for the Vermont bank robbery which occurred on April 11, 1974 and reduced his sentence on other prior crimes. (A. 32)

Gardner's testimony at the time of trial proved him to be anxious to assist the Government in its effort to convict the defendant, but a less than truthful witness. On direct examination he testified in great detail about a "dry run" of the April 11th robbery in which he said Brant and a Mr. Bishop participated. Gardner testified that this robbery was planned in late November or early December of 1973, and that the dry run was made "just before Christmas" in 1973. (A. 33, 34) This "dry run" was intended as a robbery of

the branch of the Chittenden Trust Company which was in fact robbed on April 11, 1974, but because things did not go according to plan, the group did not go through with it. However, they did go so far as to steal an automobile to be used in the crime. That automobile was stolen on December 20, 1973. While Mr. Gardner did not admit during the course of the trial that he was lying about the presence of Mr. Bishop in this robbery attempt, there is ample evidence, including Gardner's own prior testimony, that Bishop could not have been there. Most importantly, Mr. James S. Goulding testified that it was his job at the Adult Correctional Institute in Cranston, Rhode Island, to keep the records of that institution, and those records clearly indicate that Mr. Bishop was present in the correctional institution from December 4, 1973 to date of trial. (A. 37, 38, defendant's "D"). Thus, it was Gardner's sworn testimony that Bishop was participating in the conspiracy with Mr. Brant on a date when Mr. Bishop was actually incarcerated. Furthermore, Gardner was confronted with previous testimony that he had given under oath in the case of State of Rhode Island v. Alfred J. Bishop, heard on November 27, 1974. (A. 44) In that proceeding he was asked the following question: "The last time you saw Alfred Bishop was the Friday before December 3rd which according to my calculation is November 29, 1973?" His response at that time was "Yes". (A. 45) When confronted with these facts on cross-examination Mr. Gardner refused to refer to his testimony that the dry run took place at the end of December and merely repeated that he never set the positive date of December 20th. He said in several places that he "felt" that Bishop participated in this attempt. (A. 40-42, 45, 46)

What is most crucial about his falsification of testimony is that witness Gardner was the only individual to identify Mr. Brant as a participant in the April 11 robbery. The entire trial could have taken place with another individual standing in Mr. Brant's shoes as defendant, and all the evidence of Brant's alleged participation in the Vermont robbery would have been identical. In short, the trial presented Gardner with the opportunity to put any of his enemies behind bars. Gardner stated to the court it was his belief that Brant was anxious to harm his (Gardner's) girlfriend. Gardner went so far as to blurt out: "He is trying to find out where she is, and if he can find out where she is, he will have her killed. He had his own wife shot. This guy is an animal." (A. 43) Thus, testifying against Brant provided Gardner with a perfect opportunity to insulate his girlfriend from the harm which he feared while allowing Gardner's true accomplice in the robbery to remain at large.

It was the testimony of informant Gardner which the Government sought to corroborate at the expense of Mr. Brant. There simply can be no question that the evidence of Brant's alleged participation in the New Hampshire bank robbery for which he was not even indicted was prejudicial. There was no opportunity for defense counsel to investigate the facts of the New Hampshire case so as to gather evidence or provide rebuttal witnesses. Consequently, all of the evidence of the New Hampshire robbery tended to convince the jury that the defendant was indeed a very bad man who would be likely to go out and rob a third bank if they did not convict him of the Vermont robbery. The testimony regarding robbery in New Hampshire provided no unique or identifying characteristics to distinquish it from bank robberies in general and cannot

be considered evidence of a similar scheme, plan or modus operandi. The evidence was not "substantially relevant for a purpose other than merely to show defendant's criminal character or disposition", United States v. Deaton, 381 F.2d 114 (2d Cir. 1967) at 117, and its probative value is infinitely less than its potential prejudice. This inflamatory material was presented to the jury without a word of caution from the bench, and it was a case where there was no evidence of the defendant's guilt except for the testimony of the accomplice Gardner. The Government's evidence was submitted for a most dubious purpose and proved to be without evidentiary value, but inherently prejudicial to the defendant. It is difficult to imagine a situation in which the balance of probative worth and prejudicial character could more clearly require exclusion of the evidence offered. Should this Honorable Court sustain the trial court's admission of such evidence the integrity of the criminal system of justice will be undermined, and any rational limitations upon the use of such evidence will be effectively destroyed.

II. THE REFUSAL OF THE TRIAL JUDGE TO POLL THE JURY AFTER LEARNING OF PREJUDICIAL PUBLICITY DURING THE TRIAL WAS REVERSIBLE ERROR.

Despite the anticipated length of these proceedings the jury was not sequestered. During the three day holiday which ended on May 27, the news media publicized an attempted escape by Mr. Brant. This matter was brought to the attention of the Judge immediately upon resumption of proceedings on May 27. (A. 53) Counsel for defense moved the court to poll the jury to determine whether any of the jurors had heard the publicity. The judge replied that he himself had: "read the newspaper and it said that Mr. Brant, on Sunday evening, overpowered the guard and attempted to leave from

the Burlington Correctional Center, was apprehended at the corner of College and South Winooski Avenue, which the Court takes judicial notice is about a block from the correctional center, by a Burlington Police officer and returned to the correctional center". (A. 53, 54) Defense counsel purported that the news had reached as far as Rutland and again asked the court to poll the jury as to whether each juror discussed anything about the case over the weekend, heard anything about it or heard anything to do with the case. (A. 54, 55) Counsel for the Government advised the court to "proceed as if nothing happened in the hope that we would ride over this problem as smoothly as possible". (A. 55) Both the court and the United States Attorney were of the opinion that a poll of the jury might increase possible interest in the publicity. The trial judge went so far as to state that if a juror were to answer: "'yes, I have read about the jail break'" that this would not provide the basis for a mistrial. Thus, the Honorable Trial Judge demonstrated his miscomprehension of the issue at hand. The crucial question which the trial court did not allow to be resolved was whether the prejudicial nature of the publicity did in fact influence one or more members of the jury. It is not here argued that a positive response by one or more jurors that they had simply read the article would necessarily require a mistrial. The contention rather is that it was the strict obligation of the court to inquire and resolve the question of whether any jurors had been influenced by the publicity. The motion to poll the jury was denied. (A. 56) The publicity mentioned Brant by name and not only gave rise to the inference that he was a dangerous person because he overpowered the personnel at the correctional center, but was inherently prejudicial per se in that the jury could easily infer from Brant's

desire to escape that the defendant had determined in his own mind that he has been proven guilty. This situation is substantially similar to that reviewed by the Third Circuit in its decision of United States ex. rel. Doggett v. Yeager, 472 F.2d 299 (3d Cir. 1973). Yeager appealed his conviction for bank robbery on the ground that he had been denied due process because the court failed to poll the jury after a local newspaper reported that there had been an apparent breakout attempt by three prisoners including the defendant during trial. The article also disclosed the fact that Mr. Doggett had previously pleaded guilty and then changed his plea. The court noted that "the article disclosed Doggett's prior guilty plea and strongly suggested that he had attempted an escape. One could hardly imagine a combination of newspaper items more likely to suggest to the jury Doggett's consciousness of guilt". Id. at 231. The trial court did not question the jurors individually but did poll the jury en banc to learn that four members of the jury had seen the newspaper and two of them had read something about the occurrence. Motions to excuse these two jurors immediately were denied. However, the jurors were dismissed at the end of the court's charge. In considering whether it was prejudicial error for the court not to poll each juror separately the court considered and quoted a number of sections from the American Bar Association project on standards for criminal justice, standards relating to fair trial and free press. Among these standards is the following, 3.5 (F): "[I]f it is determined that the material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the

presence of the others, about his exposure to the material". [Emphasis by the court] Doggett, supra at 235. The courtthen reviewed the course of developing law in the United States Supreme Court and ordered a new trial after making its own independent evaluation of the circumstances because "there was a substantial likelihood that the contents of the newspaper accounts making reference to his retracted guilty plea and to an alleged escape attempt came to the attention of the jurors who deliberated". Id. at 239. Furthermore, as noted in Doggett, supra at 238, it is not incumbent upon the defendant to prove actual prejudice. See also United States v. Hankish, 502 F.2d 71 (4th Cir. 1974). In the Hankish decision the appellate court felt "compelled to order a new trial because of the possibility that the jury's verdict may have been influenced by the prejudicial newspaper article". Id. at 76. This conclusion was based in large part upon the following rationale which applies equally well to the case here under consideration:

> "Here we cannot explore other curative devices because of the district judge's failure to lay open the extent of the infection. It is possible that none of the jurors had seen the article. Had it appeared that some or all had read it, it is also possible that colloquy with the court might have been demonstrated that such jurors understood their duty to wholly disregard the prejudicial information and were mentally and emotionally capable of heeding the court's instruction to do so. But this is mere speculation." Id. at 77.

The most basic principal to be applied to this case is stated clearly by Justice Clark in Sheppard v. Maxwell, 384 U.S. 333, 16 L.E.2d 600, 86 S.Ct. 1507 (1966):

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure the balance is never weighed against the accused. And appellant tribunals have the

duty to make an independent evaluation of the circumstances . . . . If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered." Id. at 362-363.

As noted in Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968):

> "Jurors are not presumed to separate the truth from the falsity in newspaper articles concerning the trial in which they sit as judges of fact. The jury's impartiality must be kept free from 'any outside influence, whether of private talk or public print'. Patterson v. Colorado, supra, 205 U.S. at 462, 27 S.Ct. at 558, 51 L.Ed. 879. It is therefore the affirmative duty of the trial court to take positive action to ascertain the existence of improper influences upon the jurors' deliberative qualifications and to take whatever steps are necessary to diminish or erradicate such improprieties. Coppedge v. United States, supra, 272 F.2d at 508." [Emphasis added] Silverthorne v United States, supra, at 643.

For at least twenty years the position of the Second Circuit has been similar. Where the trial court has polled jurors individually, admonished them, and in the proper exercise of its discretion, continued with trial, verdicts have been upheld. United States v. Postma, 242 F.2d 488 (2d Cir. 1957); United States v. Feldman, 299 F.2d 914 (2d Cir. 1962). However, no recorded decision reveals that this court has gone so far as to sustain the actions of a trial judge who refused the motions of defendant's counsel to poll the jury after the judge himself had read the prejudicial material prior to the motion. On the contrary, the approved procedure in this circuit was enunciated by Judge Oakes in the case of United States v. Palmieri, 456 F.2d 9 (2d Cir. 1972) as follows:

> "Where juries are not generally sequestered (e.g., Connecticut; the Southern District of New York), and the trial judge can anticipate prejudicial publicity, he might inform the jury of its duty not to read or listen to any story about the trial, tell the jurors on their oath that he will ask them on their oaths the following morning if they have read or listened to any such

stories, and then do just that before starting the next day's trial." [Emphasis added] Id. at 14 N.3

It is noted that the trial court habitually and properly admonished the jurors at each recess of the trial that they should not discuss the case among themselves or with others or listen to anything or read anything about the case. (A. 14, 36, 39, 48, 51, 52, 59) However, such admonitions in and of themselves are no substitute for a poll of the jury. They do, nonetheless, establish a basis for polling the jurors without giving rise to undue tension and surprise on the part of jurors when a poll is had. Indeed, the first day of trial the judge laid an excellent foundation for polling the jury without overly arousing their curiosity. At that time the court admonished the members of the jury and told them: "the test you should apply as far as your conduct is concerned is that in the morning you can come into court and I can ask any one or all of you, individually, whether or not you followed my instructions and whether or not you discussed the case with anybody or read about it, or listened to it, you can answer me honestly you have not." (A. 15) Having been so instructed by the court, no juror would have been surprised if after a three day recess precisely those questions were asked, in accordance with the formula prescribed by Judge Oakes in Palmieri. It is most unfortunate that when the need arose the court did not assume its responsibility to poll the jurors individually but rather followed the suggestion of the United States Attorney to "proceed as if nothing happened". (A. 55) As expressed by Mr. Justice Holmes many years ago in Patterson v. Colorado, 205 U.S. 454 at 462 (1907) and quoted by the court with approval in Sheppard v. Maxwell, 384 U.S. 333 at 351 (1966): "The theory of our system is that

the conclusion to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." It is the duty of the trial judge when prejudicial matter is brought to the jury's attention during the course of trial to see that a "careful, individual examination of each of the jurors involved, out of the presence of the remaining jurors, as to the possible effect of the articles" is carried out to insure the due process envisioned by Mr. Justice Holmes. See ABA Standards relating to fair trial and free press, Section 3.4.

III. IT WAS ERROR FOR THE TRIAL COURT NOT TO GRANT DEFENDANT'S MOTION FOR NEW TRIAL.

After trial counsel for the defense filed a motion for new trial which motion incorporated an article in the Burlington Free Press. The Burlington Free Press is the only daily newspaper of general circulation in the Burlington area. This article is set forth in its entirety in the Appendix at page 8. At the time when the trial court heard argument upon defendant's motion for new trial, counsel relied upon the decision of Marshal v. United States, 360 U.S. 310 (1959). Further authority from the United States Supreme Court is found in the later decision of Sheppard v. Maxwell, supra.

Particularly in light of the exposure of the jurors to previous publicity of Brant's escape attempt, the court should have realized the cumulative potential for prejudice presented by this publicity. It is not suggested that the trial court lacks discretion in these matters. However, it is respectfully submitted that just as the trial court abdicated its responsibility with regard to the initial publicity it abused its discretion in failing to either poll the jury after trial or grant defendant's motion for a

new trial. This abuse of discretion is not unrelated to the court's error in admitting the evidence of the New Hampshire bank robbery. On appeal this Honorable Court must not be unmindful that in addition to the evidence of an unrelated bank robbery, the jury may well have founded its verdict upon the information in the press that defendant would be tried for a double murder in Connecticut and attempted to escape from the Burlington Correctional facility by force. The tendency of all of these factors is to give the jurors the abiding conviction that, regardless of whether Brant conspired to commit or did commit the bank robbery in question, Brant was a dangerous individual and a threat to public safety. In the absence of the poll of the jury in the presence of compounded prejudicial publicity a new trial is required to assure that whatever verdict is returned by a jury will be founded upon evidence properly admitted to prove defendant's guilt. Under the circumstances because of the trial court's unwillingness to examine the jurors, the only remedy which can insure a fair hearing for the defendant is a new trial.

CONCLUSION

The trial court erroneously allowed the introduction of evidence of a purported prior crime of the defendant for which defendant was not indicted and which was no more similar to the crime with which defendant was charged than it was similar to all other bank robberies in general. Given the paucity of evidence connecting the defendant with the crime charged in the indictment and the dubious veracity of the Government's principal witness, the prejudicial effect of the admission of such evidence requires that this case be remanded for a new trial.

Similar relief must follow from the trial court's refusal to poll the jurors after news media accounts reported that the defendant forceably left the Burlington Correctional Center, and the trial court's denial of defendant's motion for new trial. Due process requires that the court upon its own initiative go at least so far as to question the jurors individually and make a determination that publicity has not unduly influenced or biased members of the panel. In the absence of such inquiry by the court, a new trial is required.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

UNITED STATES OF AMERICA	)	
	)	
VS	)	CRIMINAL NO. 75-16
	)	
DONALD RICHARD BRANT	)	

CERTIFICATE OF SERVICE

I, Alden T. Bryan, Esq., a member of the firm of Hoff, Curtis, Bryan, Quinn & Jenkins, 192 College Street, Burlington, Vermont, attorneys for defendant-appellant in the above matter, do certify and say that on the 25th day of November, 1975, I did serve a copy of the defendant's Brief and Appendix upon the Honorable George W. F. Cook, U.S. Attorney, Federal Building, Rutland, Vermont 05701, by placing the same in an envelope properly addressed and prepaid and by placing said envelope in the United States Mail for delivery.

Alden T. Bryan, Esq.